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January 27, 2006

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: July 29, 2005

Case Number: TSO-0274

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹ In this Decision I will consider whether, on the basis of the testimony and other evidence in the record of this proceeding, the individual's access authorization should be reinstated. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be reinstated at this time.

I. Background

The individual held a DOE security clearance at various times between 1995 and 1999. In June 2003, the individual's employer, a DOE contractor, requested that the DOE reinstate the individual's security clearance. During an ensuing background investigation, the local security office (LSO) uncovered derogatory information regarding the individual's use of alcohol. In October 2004, the LSO conducted a Personnel Security Interview (PSI) with the individual to address the derogatory information at issue. Subsequently, the LSO referred the individual to a board-certified psychiatrist (DOE consultant-psychiatrist) for a forensic psychiatric evaluation. The DOE consultant-psychiatrist examined the individual in January 2005 and concluded that the individual met the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision (DSM-IV-TR) published by the American Psychiatric Association for Substance Abuse, Alcohol.

Based on the findings contained in the psychiatric report and other information uncovered during the background investigation, the LSO sent the individual a letter (Notification Letter) advising him that it possessed reliable information that created a substantial doubt regarding his eligibility to hold a security clearance. The LSO also advised that the

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

derogatory information fell within the purview of one potentially disqualifying criterion set forth in the security regulations at 10 C.F.R. § 710.8, subsection (j) (hereinafter referred to as Criterion J).²

Upon his receipt of the Notification Letter the individual filed a written response and exercised his right under the Part 710 regulations by requesting an administrative review hearing. On August 3, 2005, the Director of the Office of Hearings and Appeals (OHA) appointed me the Hearing Officer in this case. After receiving an extension of time from the OHA Director, I convened a hearing. At the hearing, eight witnesses testified. The LSO called one witness and the individual presented his own testimony and that of six witnesses. In addition to the testimonial evidence, the LSO submitted 24 exhibits into the record; the individual tendered one exhibit.

II. Standard of Review

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual's access authorization eligibility shall be resolved in favor of national security." 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of the individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

II. Findings of Fact

All of the facts in this case are undisputed. In an eight-year period the individual has been arrested four times for alcohol-related offenses. The individual's first alcohol-related arrest occurred in 1997 when he was 20 years old. On this occasion, the police arrested the individual and charged him with "Under Age Person Procuring Alcoholic Beverages." Exhibits 13, 22. The individual's second arrest occurred the following year. In August 1998, the police arrested the individual and charged him with Driving While Intoxicated (DWI) after his blood alcohol concentration (BAC) registered .15 on a breathalyzer. Exhibit (Ex.) 12. The individual received his second DWI in November 2000. This time the breathalyzer administered to the individual yielded a BAC of .16. Ex.

² Criterion J relates to information that a person has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j).

14. As a result of the 2000 DWI, the court: (1) suspended the individual's driving privileges for 12 months; (2) placed the individual on six months of unsupervised probation; (3) fined the individual \$1200; and (4) ordered the individual to attend an alcohol screening program, followed by 100 hours of alcohol counseling. Ex. 8 at 3. According to the record, after the individual had completed his probation and substance abuse counseling, he resumed drinking alcohol again. *Id.* In June 2004, the individual received his third DWI after a breathalyzer test revealed a BAC of .19. Exs. 18-21. The individual entered into a plea agreement in connection with the 2004 DWI whereby he agreed to serve 30 days in jail and to remain on supervised probation for a one-year period. Ex. 8 at 4; Transcript of Hearing (Tr.) at 86. The court also required the individual to: (1) refrain from consuming alcohol for a period of one year as part of his probation, (2) attend an alcohol screening program, and (3) attend alcohol counseling. Ex. 8 at 10, Tr. at 81.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should not be reinstated at this time. I cannot find that such a reinstatement would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Derogatory Information and Associated Security Concerns

The derogatory information under Criterion J in this case arises from three principal sources: the diagnosis by a board-certified psychiatrist that the individual is suffering from Alcohol Abuse, several significant recent legal incidents stemming from the individual's excessive use of alcohol and the individual's statements that he reported late to work once or twice a month after having consumed alcohol excessively the previous evening. *See* Ex. 24 at 92-94, Ex. 8 at 8, Response to the Notification Letter.³

On the basis of the record, I find that the LSO properly invoked Criterion J in refusing to reinstate the individual's security clearance. The DOE consultant-psychiatrist's diagnosis of Alcohol Abuse is corroborated by the individual's admitted numerous legal difficulties stemming from his use of alcohol and his statements regarding alcohol's negative impact on his ability to report to work in a punctual manner. In other DOE security clearance proceedings, Hearing Officers have consistently found that a diagnosis related to excessive alcohol use raises important security concerns. *See, e.g., Personnel Security Hearing*, Case No. TSO-0168, 29 DOE ¶ 82,807 (2005); *Personnel Security Hearing*, Case No. VSO-0079, 25 DOE ¶ 82,803 (1996) (affirmed by OSA, 1996); *Personnel Security Hearing*, Case No. VSO-0042, 25 DOE ¶ 82,771 (1995) (affirmed by OSA, 1996); *Personnel Security Hearing*, Case No. VSO-0014, *aff'd*, *Personnel Security Review*, 25 DOE ¶ 83,002 (affirmed by OSA, 1995). In these cases, it was recognized that the excessive use of alcohol might impair an individual's judgment and reliability,

³ In his response to the Notification Letter, the individual clarified that prior to June 11, 2005 he had been late to work at least one time per month.

and his ability to control impulses. These factors amplify the risk that the individual will fail to safeguard classified matter or special nuclear material. *Id.* Accordingly, I will turn to whether the individual has presented sufficient evidence to mitigate the security concerns at issue here.

B. Mitigating Evidence

With regard to the issue of rehabilitation or reformation, the individual argues that he has abstained from alcohol for 16 months, has completed an alcohol treatment program, and has attended a few AA meetings. According to the individual, he has not consumed any alcohol since June 11, 2004, the date on which he received his third DWI. Ex. 8 at 5. In addition, the individual testified that in May 2005 he completed the court-ordered alcohol treatment program stemming from his 2004 DWI. *Id.* at 81. To support his testimony in this regard, the individual submitted a letter from a psychotherapist confirming that the individual had completed 24 hours of group education and six hours of individual therapy. Ex. A. The letter indicates that the individual completed the terms of his court-ordered treatment on May 4, 2005. *Id.* Furthermore, the individual testified that he attended four or five Alcoholics Anonymous (AA) meetings while he was incarcerated for 30 days in February 2005. Tr. at 83.⁴ The individual explained at the hearing that he is not currently attending AA because his schedule does not permit him to do so. *Id.* at 89, 146-47.

At the hearing, the DOE Counsel pointed out that following the individual's second DWI the individual completed a court-ordered treatment program and then abstained from alcohol for one and one-half years. Tr. at 86. The DOE Counsel then asked the individual why the DOE should believe that he will continue to maintain his abstinence in light of his previous history of using alcohol following the completion of a court-ordered alcohol treatment program. *Id.* The individual responded that the 30 days in jail following his third DWI "scared him." *Id.* at 86, 152. He also cited as a motivating factor the embarrassment that he experienced when he returned to work as part of the prison "work release" program, hearing his peers make derogatory comments about his situation. *Id.* at 152. The individual added that "not drinking" makes him a better person. *Id.* at 86.

Testimonial evidence from two of the individual's friends, a subordinate and a manager corroborate the individual's testimony that he is not currently consuming alcohol. One of the individual's former "drinking buddies" (Friend #1) who is no longer consuming alcohol himself testified that he knows that the individual has stopped drinking alcohol. Tr. at 67. Friend #1 testified that he has told the individual to "change his friends, his lifestyle, everything" to assist in maintaining his sobriety. *Id.* at 75. Friend #1 also testified that he and the individual engage in volunteer activities to maintain their sobriety. *Id.* at 76. Specifically, Friend #1 related that he and the individual work at teen centers, a rape crisis center and a church. *Id.* Friend #1 stated that the individual confided in him that he did not like the AA meetings. *Id.* at 68.

⁴ One of the individual's co-workers runs the AA meetings at the jail where the individual served his sentence. At the hearing, the co-worker corroborated the individual's testimony that the individual had participated in four or five jailhouse AA meetings in February 2005. *Id.* at 30.

Friend #2 who carools with the individual testified that he and the individual used to drink beer together. *Id.* at 61. Friend #2 related that it has been more than one year since the individual and he drank beer together. *Id.* at 62.

One of the individual's subordinates testified that he has daily interaction with the individual and has never seen him come to work "hung over." *Id.* at 49. The two socialize outside of work. *Id.* at 50. In fact, the subordinate was in the car with the individual when the individual was arrested for his third DWI. *Id.* at 52. The subordinate testified that he has not seen the individual consume alcohol since June 2004. *Id.* at 56. The subordinate added that he still consumes alcohol but does not drink around the individual because he does not "want to be a bad influence." *Id.* at 54.

The individual's manager testified that the individual is a very good employee. *Tr.* at 12. He related that the individual's performance has dramatically improved in the last year. *Id.* at 19. Specifically, the manager has noticed an improvement in the individual's clarity of thought, ability to focus and his lucidity. *Id.* at 17. The manager could not comment on whether the individual's abstention from alcohol has contributed to the individual's performance improvement. *Id.* at 19. The manager added that he never saw the individual in a "hung-over" state at work. *Id.* at 23.

The DOE consultant-psychiatrist listened to the testimony presented by the individual and his witnesses before he testified. The DOE consultant-psychiatrist testified that based on the testimonial and documentary evidence presented at the hearing, he believes that the individual has made a good start and is "on the right track" to addressing his Alcohol Abuse problems. Nevertheless, the DOE consultant-psychiatrist found that the individual had not achieved adequate reformation or rehabilitation as of the date of the hearing. *Id.* at 137. By way of explanation, the DOE consultant-psychiatrist first referred to his psychiatric report in which he stated that the individual needed to participate in an outpatient treatment program of moderate intensity for one to two years to demonstrate adequate evidence of rehabilitation and reformation. *Id.* at 135-136. At the hearing, the DOE consultant-psychiatrist stated that when he met with the individual in January 2005 the individual exhibited a high level of denial with regard to his DWIs. *Id.* at 136. For this reason, the DOE consultant-psychiatrist recommended more than one year of outpatient treatment. *Id.* With regard to the individual's treatment to date, the DOE consultant-psychiatrist did not find it to be adequate. First, the AA meetings that the individual attended occurred while he was in jail, a fact which caused the DOE consultant-psychiatrist to call into question the voluntariness of the individual's participation in these four or five meetings. Second, the only outpatient treatment that the individual has received was court-ordered, a fact that made the DOE consultant-psychiatrist question the individual's voluntary commitment to treatment. *Id.* at 138. Third, the DOE consultant-psychiatrist pointed out that individual has experienced two prior relapses with some significant consequences after having either participated in court-ordered treatment and then maintained sobriety for a sustained period or abstained on his own. *Id.* at 145. Fourth, the DOE consultant-psychiatrist was concerned that the individual is not in treatment now because the individual may not be as committed to putting forth the effort at maintaining his sobriety as he should be. *Id.* at 144. Fifth, the DOE consultant-psychiatrist also considered that the individual was mandated by the

court not to consume alcohol for one year from June 2004 as a condition of probation.⁵ *Id.* at 138. In response to my inquiry at the hearing, the DOE consultant-psychiatrist stated that the individual would need three years of abstinence from alcohol, *i.e.*, until June 11, 2007 if he elected not to participate voluntarily in an outpatient treatment program of one to two years duration. *Id.* at 144.

In the administrative review process, Hearing Officers accord great deference to the opinions of psychiatrists and other mental health professionals regarding the issue of rehabilitation and reformation. *See e.g.*, *Personnel Security Hearing* (Case No. VSO-0146), 26 DOE ¶ 82,788 (1997) (affirmed by OSA, 1998) (finding rehabilitation); *Personnel Security Hearing* (Case No. VSO-0027), 25 DOE ¶ 82,764 (1995) (affirmed by OSA, 1995) (finding of rehabilitation); *Personnel Security Hearing* (Case No. VSO-0015), 25 DOE ¶ 82,760 (1995) (affirmed by OSA, 1995) (finding of no rehabilitation). In this case, I have accorded substantial weight to the opinion of the DOE consultant-psychiatrist who testified that the individual has not yet achieved reformation and rehabilitation. Specifically, I found the reasons articulated by the DOE consultant-psychiatrist to support his opinion of “no rehabilitation or reformation” to be extremely persuasive.

Overall, the major factor that weighs heavily against the individual is his history of failed attempts to maintain sobriety after periods of abstinence as long as 18 months. According to the record, after the individual’s second DWI he completed a 100-hour alcohol treatment course but subsequently resumed drinking seven beers in a six-hour period at least four days a week after a lengthy period of abstinence. Ex. 8 at 3; Tr. at 86. At the hearing, the individual also revealed that prior to his third DWI in 2004, an acquaintance had persuaded him to attend AA because that acquaintance was concerned that the individual was “poisoning his body” with alcohol. Tr. at 84. According to the individual, he had attended two AA meetings before he received his third DWI. *Id.* The fact that the individual received a DWI in 2004 almost immediately after attending two AA classes and a few years after completing 100 hours of alcohol treatment suggests to me that the individual did not learn much about the dangers of alcohol from these programs or how to maintain his sobriety. While the individual suggests that his 16 months of sobriety and

⁵ In his psychiatric report, the DOE consultant-psychiatrist noted that the individual’s liver enzymes were twice the normal limit. Ex. 8 at 7. Because of these abnormalities the DOE consultant-psychiatrist believed that the individual was still consuming alcohol to excess in January 2005 when he ordered the laboratory tests. *Id.* at 8. The individual told the DOE consultant-psychiatrist in January 2005 that he had been taking Nyquil, an over-the-counter medication that contains alcohol. *Id.* at 9. At the hearing the individual produced three huge bottles of muscle enhancers and dietary supplements that he was taking in January 2005. *Id.* at 130-134. The DOE consultant-psychiatrist reviewed the list of ingredients in the three bottles and discovered that one bottle contained a Chinese herb which is ephedra, an ingredient that the United States has banned from distribution in the U.S. because of its potentially harmful health effects. *Id.* at 131. Based on the record before me, I am unable to determine why the individual’s liver enzymes were elevated in January 2005. I did provide the individual an opportunity to supplement the record with new laboratory tests following a period of several weeks of abstention from his various dietary supplements. The individual never submitted any new test results. Notwithstanding this fact, I am convinced from the individual’s testimony and the testimony of the individual’s subordinate that he has not consumed alcohol since June 2004. The individual provided credible testimony to me that he did not consume alcohol between June 2004 and June 2005 because he feared violating the terms of his probation and returning to jail. Friends #1 and #2 and the individual’s subordinate also provided credible testimony that convinces me that the individual has not consumed alcohol from June 2005 onward.

the 30 hours of recent alcohol treatment that he received pursuant to court order in 2005 shows that he is rehabilitated, I do not agree. While it is commendable that the individual has maintained his sobriety for 16 months, there are two reasons why this length of abstinence alone is insufficient for me to find rehabilitation or reformation in this case. First, for 12 of the 16 months at issue, the individual was under court order to refrain from drinking alcohol or to risk returning to jail. Second, in view of the individual's two previous relapses, one after 18 months of sobriety, I find that more time needs to elapse before I can make a predictive assessment that the individual will maintain his sobriety. With regard to the 30 hours of alcohol treatment that the individual completed in May 2005, I only accorded neutral weight to the individual's participation in this program because it was involuntary. It is quite telling, in my opinion, that the individual has not found time to participate in AA or an Employee Assistance Program (EAP) to help him maintain his sobriety. Because the individual has elected to address his Alcohol Abuse through abstinence alone and not with the aid of either (1) a mental health or medical professional or (2) a program such as AA or EAP, I must concur with the opinion of the DOE consultant-psychiatrist that the individual must remain sober until June 2007 before he can be considered rehabilitated or reformed from his Alcohol Abuse. Therefore, based on all the foregoing considerations, I find that the individual has not mitigated the security concerns associated with his Alcohol Abuse.

V. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. § 710.8 (j) in suspending the individual's access authorization. For the reasons that I have discussed above, I am therefore unable to find that reinstating the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be reinstated at this time. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: January 27, 2006